No. 18-6272

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHASE EDWARD LUCAS,

Plaintiff/Appellant,

vs.

ALLEN CHALK

Defendant/Appellee

Appeal from the United States District Court
for the Western District of Tennessee
The Honorable James D. Todd
No. 18-12111

BRIEF *AMICI CURIAE* FOR LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., JUST DETENTION INTERNATIONAL, AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PLAINTIFF/APPELLANT CHASE EDWARD LUCAS

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FED. R. APP. P. RULE 29(a)(2) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(2), *Amici* have received Appellant's consent to file this amicus brief.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), Just Detention International ("JDI"), and the Center for Constitutional Rights ("CCR") respectfully submit this brief in support of Plaintiff-Appellant Chase Edward Lucas.[1] *Amici* are non-profit civil rights and public policy organizations that advocate for incarcerated people including lesbian, gay, bisexual, and transgender ("LGBT") people through litigation and public policy. *Amici* have an interest in ensuring that the Constitution's guarantees to be free from cruel and unusual punishment and equal protection of the law apply to all people and that incarcerated LGBT people have access to the courts.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

policy work. Lambda Legal was founded in 1973 and has worked to address the particular vulnerability of LGBT people in custody through comments to the National Prison Rape Elimination Act Commission, the Department of Justice, the Department of Homeland Security, and testimony to the United States Senate. Lambda Legal has appeared as counsel or *amicus curiae* in numerous federal and state court cases involving the rights of incarcerated LGBT people. Lambda Legal is counsel for *Amici.*

Just Detention International ("JDI"), founded in 1980, is the only organization in the world dedicated exclusively to ending sexual abuse behind bars. JDI was one of the key groups that worked to successfully pass the Prison Rape Elimination Act in 2003. JDI continues to work with government officials; policy makers; correctional agencies, facilities and staff; currently and formerly incarcerated people; and the public to promote the dignity and sexual safety of people in detention and to ensure that survivors of custodial sexual abuse get the help they need.

The Center for Constitutional Rights ("CCR") is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals

impacted by arbitrary and discriminatory criminal justice policies, including policies that disproportionately impact LGBTQI communities of color and policies that violate the Eighth Amendment's prohibition against cruel and unusual punishment and cause significant harm to people in prison. CCR successfully mounted a challenge regarding the use of solitary confinement in prisons and jails in its class action *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal 2009).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents an important issue under the Prison Litigation Reform Act ("PLRA") in the Sixth Circuit: whether a *pro se* prisoner's complaint alleging denial of medical care and discriminatory treatment because of his sexual orientation by a prison official states a claim that should survive dismissal at the screening stage and warrants leave to amend the complaint.

It is well-established that lesbian, gay, bisexual, and transgender ("LGBT") people are disproportionately incarcerated and at greater risk of sexual assault from both other inmates and staff while incarcerated. Congress enacted the Prison Rape Elimination Act ("PREA") to set national standards addressing sexual abuse in the United States' systems of incarceration. The National Standards to Prevent, Detect, and Respond to Prison Rape, recognize that LGBT people experience a heightened risk of sexual assault and require mental health care for all sexual assault victims. These factors counsel careful scrutiny of LGBT *pro se* prisoners' complaints involving sexual assault and denials of medical care. Chase Edward Lucas' ("Lucas") complaint stated a claim for denial of medical care, an Eighth Amendment violation, and discriminatory treatment because of his sexual orientation, an Equal Protection violation. The District Court failed to abide by the liberal pleading standard required for *pro se* individuals in finding that the complaint did not state a claim.

District courts must engage in meaningful review of complaints filed by *pro se* prisoners, under the PLRA, while applying a less stringent pleading standard to *pro se* plaintiffs. Here, the district court disregarded the clear allegations in the complaint and did not apply a less stringent pleading standard.

Amici respectfully request the Court to hold that Lucas' complaint sufficiently states a claim and reverse the Final Judgment of the District Court.

ARGUMENT

I. LGBT PEOPLE EXPERIENCE DISPROPORTIONATE RATES OF INCARCERATION AND HIGHER RATES OF SEXUAL VIOLENCE WHEN IN CUSTODY

When reviewing decisions dismissing *pro se* complaints from incarcerated LGBT people, this Court must ensure that lower courts abide by the liberal pleading standard afforded to *pro se* plaintiffs. Due to systemic bias, LGBT people are more likely to experience poverty, be incarcerated, and face disproportionate rates of sexual abuse in custody. It is critical to indigent, incarcerated LGBT people that their complaints are reviewed under the same liberal pleading standard afforded to all *pro se* plaintiffs.

Bias against LGBT people in schools, employment, housing, and healthcare can have devastating effects, including economic insecurity, homelessness, and

increased encounters with law enforcement.[2] According to one survey, "more than 44% of bisexual youth reported having been bullied, threatened, or harassed in the past year through the Internet or by text, compared to 20% of straight youth, 30% of lesbian and gay youth, and 31% of questioning youth."[3] LGBT people are more likely to live in poverty and experience higher unemployment and homelessness than non-LGBT people.[4] "The largest proportion of lesbian, gay, and bisexual (LGB) youth experiencing homelessness identify as bisexual."[5] The "Pew Research Center found that 48% of bisexual respondents reported an annual family income of less than $30,000, compared to 30% of gay men, 39% of lesbians, and 28% of all adults in the United States."[6] In turn, poverty, increased encounters with law enforcement, and a lack of understanding of LGBT people or bias by law enforcement officials during encounters can lead to incarceration.[7]

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[2] *See generally* Lourdes Ashley Hunter et al., *Intersecting Injustice: A National Call to Action, Addressing LGBTQ Poverty and Economic Justice for All* (Lourdes Ashley Hunter et al. eds., 2018), https://static1.squarespace.com/static/5a00c5f2a803bbe2eb0ff14e/t/5aca6f45758d46742a5b8f78/1523216213447/FINAL+PovertyReport_HighRes.pdf.

[3] Movement Advancement Project, *Invisible Majority: The Disparities Facing Bisexual People and How to Remedy Them* 7 (2016), http://www.lgbtmap.org/file/invisible-majority.pdf.

[4] *Id.*; *see* Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, (2011), http://endtransdiscrimination.org/PDFs/BlackTransFactsheetFINAL_090811.pdf.

[5] Movement Advancement Project, *supra* note 3, at 9.

[6] *Id.* at 10.

[7] Brenda Smith et al., Nat'l Inst. Of Corrs., *Policy Review and Development Guide: Lesbian, Gay Bisexual, Transgender, and Intersex People in Custodial Settings* (2d. ed. 2015) https://info.nicic.gov/sites/info.nicic.gov.lgbti/files/lgbti-policy-review-guide-2_0.pdf ("Individuals living in poverty have a substantially higher rate of involvement with the juvenile and criminal justice systems.").

While bias on the basis of gender identity or expression is different than bias on the basis of sexual orientation, the experiences of transgender people are instructive for understanding the experiences of LGB people; both groups are often targeted for failing to conform to gender stereotypes. In a national survey of transgender people, 40% of respondents interacted with law enforcement officers in the year prior to the survey.[8] In interactions in which respondents believed officers thought or knew they were transgender, more than half (58%) reported experiencing one or more forms of mistreatment, such as repeatedly being referred to as the wrong gender, verbal harassment, and physical attack.[9] Of those, six percent (6%) reported being physically attacked, sexually assaulted, or forced to engage in sexual activity to avoid arrest.[10]

LGBT people are disproportionately incarcerated.[11] "According to the National Inmate Survey, in 2011- 2012, 7.9% of individuals in state and federal prisons identified as lesbian, gay, or bisexual, as did 7.1% of individuals in city and county jails[,] . . . approximately double the percentage of all American adults

[8] Sandy E. James et al., Nat'l Ctr. For Transgender Equal., *Report of the 2015 U.S. Transgender Survey*, 185 (2016), http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.
[9] *Id*. at 186.
[10] *Id.* At 187
[11] *See* Ctr. For Am. Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, iii-iv (2016), http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf.

who identify as LGBT, according to Gallup (3.8%)."[12] "The incarceration rate of self-identified lesbian, gay, or bisexual persons was . . . more than 3 times that of the US adult population."[13]

Once incarcerated, LGBT people are sexually assaulted by other inmates at a disproportionate rate. "[R]esearch on sexual abuse in correctional facilities [has] consistently documented that men and women with nonheterosexual orientations, transgender individuals, and people with intersex conditions were highly vulnerable to sexual abuse."[14] While 4% of heterosexual men have reported being sexually victimized by another inmate, 34% of bisexual men and 39% of gay men reported being victimized by another inmate.[15] "Male inmates who identified themselves as bisexual were at least 13 times more likely to report being sexually victimized by another inmate . . . than male inmates who identified themselves as straight or heterosexual."[16] Similarly, of incarcerated women, 18% of bisexual women reported sexual victimization by other inmates, compared to 13% of lesbian women and 13% of heterosexual women.[17] Regarding incarcerated

[12] *Id.* at iii.
[13] Ilan H. Meyer, et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*, 107 Am. J. Pub. Health 234, 238 (2017).
[14] Smith et al., *supra* note 7.
[15] Allen J. Beck & Candace Johnson, Bureau of Justice Statistics, *Sexual Victimization Reported By Former State Prisoners 2008*, at 5 (2012) http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf.
[16] *Id.* at 27.
[17] *Id.* at 5

transgender people, a 2009 survey of California prisons found they experience sexual victimization at a rate 13 times higher than those who are not transgender.[18] Similarly, the Bureau of Justice Statistics ("BJS") estimated that incarcerated transgender people are almost ten times more likely to have been sexually abused than others in the general prison population.[19]

Furthermore, research strongly indicates that the risks of sexual assault that incarcerated LGBT people experience from other inmates are compounded by victimization by prison and jail staff. BJS has found that of men formerly incarcerated in state facilities, 18% of bisexual men reported experiencing sexual victimization by staff, compared to 5% of heterosexual men and 12% of gay men.[20] "Male inmates who identified themselves as bisexual were . . . 4 times more likely to report being sexually assaulted by staff than male inmates who identified themselves as straight or heterosexual."[21] Of formerly incarcerated women in state facilities, the rate of sexual victimization of bisexual and lesbian women by staff was double that of heterosexual women; 8% of bisexual women and 8% of lesbian

[18] Valerie Jenness et al., UC Irvine Ctr. For Evidence-Based Corrs., *Violence in California Correctional Facilities: An empirical Examination of Sexual Assault* (2007); *see also* Sylvia Rivera Law Project, "*It's War in Here: A Report on the Treatment of Transgender & Intersex People in New York State Men's Prisons*" (2007), https://srlp.org/files/warinhere.pdf.
[19] Allen J. Beck, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*: *Supplemental Tables* (2014), http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.
[20] Beck & Johnson, *Sexual Victimization*, *supra* note 15, at 16.
[21] *Id.* at 27.

women reported experiencing sexual misconduct by state prison staff compared with 4% of heterosexual women.[22] A 2012 survey found that, of the LGBT respondents who were incarcerated in the five years prior to the survey, 7% reported sexual assault by prison or jail staff.[23] Of formerly incarcerated transgender respondents, 11% reported being sexually assaulted by facility staff during the prior year.[24] Of the survey respondents who were assaulted by staff, nearly half (49%) reported that it happened once, 9% reported that it happened twice, 19% said it happened between three and seven times, and nearly a quarter (23%) said that it happened eight or more times.[25]

It is well-established within the corrections community that LGBT people face a heightened risk of sexual abuse committed by other incarcerated individuals and staff. "Research on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations (gay, lesbian, or bisexual) as well as individuals whose sex at birth and current gender identity do not correspond (transgender or intersex)."[26]

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[22] *Id.* at 16.
[23] Lambda Legal, *Protected and Served?*, (2012), https://www.lambdalegal.org/protected-and-served/jails-and-prisons (last visited Jan. 18, 2019).
[24] James et al., *supra* note 8, at 191-92.
[25] *Id.* at 192.
[26] Nat'l Prison Rape Elimination Comm'n Report 73 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf [hereinafter "2009 NPREC Report"].

II. THE PRISON RAPE ELIMINATION ACT ESTABLISHES NATIONAL STANDARDS WHICH TENNESSEE AND OTHER STATES HAVE ADOPTED

Congress enacted the Prison Rape Elimination Act ("PREA") to "(1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; (2) make the prevention of prison rape a top priority in each prison system; [and] (3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape."[27] 34 U.S.C. § 30302. Based on this mandate, the United States Department of Justice issued a final rule adopting National Standards to Prevent, Detect, and Respond to Prison Rape in 2012. 77 Fed. Reg. 37106 (June 20, 2012) (codified at 28 C.F.R. §115). The PREA Standards "contained in this final rule apply to facilities operated by, or on behalf of, State and local governments and the Department of Justice." 77 Fed. Reg. 37107. The State of Tennessee has certified that the facilities operated by or on its behalf are in compliance with PREA[28] and the Tennessee Department of

[27] Prior to PREA's passage, courts had recognized that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

[28] *See* Bureau of Justice Assistance, *FY 2015 List of Certification and Assurance Submissions*, (2015), https://www.bja.gov/Programs/15PREA-AssurancesCertifications.pdf.

Correction ("TDOC") has issued multiple policies designed to implement the PREA Standards.[29]

The National PREA Standards developed by the Department of Justice "account in various ways for the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations." 77 Fed. Reg. 37109. The Department of Justice adopted the findings of the National Prison Rape Elimination Commission ("NPREC"), which recognized that "[f]airly consistent evidence . . . identifies characteristics that increase a prisoner's risk of sexual victimization."[30] One long-known vulnerability factor for sexual abuse in correctional facilities is whether a person is LGBT.[31] Because of the known vulnerabilities of incarcerated LGBT people, the PREA Standards "require correctional institutions to screen inmates upon intake for heightened risk of sexual abuse [including] whether the inmate is or is perceived to be LGBTI or gender nonconforming."[32] *See* 28 C.F.R. § 115.41(d)(7) ("The intake screening shall consider, at a minimum, the following criteria to assess inmates for

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[29] *See Policies & Procedures: Inmate Rights, Rules, Grievances and Disciplinary* Actions, Tenn. Dep't of Corrs. § 502.06-502.06.3, (last visited Jan. 18, 2019) https://www.tn.gov/correction/about-us/policies-and-procedures.html.

[30] 2009 NPREC Report at 75.

[31] *Id. at 7-8* ("A 1982 study in a medium-security men's facility in California, for example, found the rate of abuse was much higher among gay prisoners (41 percent) than heterosexual prisoners (9 percent).").

[32] Review Panel on Prison Rape, U.S. Dep't of Justice, *Report on Sexual Victimization in Prisons, Jails, and Juvenile Correctional Facilities,* 51 (2016), https://ojp.gov/reviewpanel/pdfs/panel_report_prea_apr2016.pdf.

risk of sexual victimization: . . . whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;"). TDOC's policy adopts this standard, and includes as a vulnerability factor to be considered at screening whether the "[i]nmate is or is perceived to be gay, bisexual, transgender, intersex or gender non-conforming."[33]

The NPREC also recognized that a previous history of sexual victimization, whether while incarcerated or prior to incarceration, increases the risk of further sexual victimization.[34] The PREA Standards also recognize that a previous history of sexual victimization, whether while incarcerated or prior to incarceration, increases the risk of further sexual victimization and require prisons and jails to screen individuals at intake to ascertain "[w]hether [an] inmate has previously experienced sexual victimization." *Id.* § 115.41(d)(8). TDOC adopted this standard and requires consideration at screening of whether a person has a "[h]istory of prior sexual victimization."[35]

In light of the high rates of sexual abuse in prisons and jails, and because the consequences of sexual abuse are far-reaching and "have the potential to harm a person in every dimension of life: psychological, physical, spiritual, and social,"[36]

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[33] *Sexual Aggressor/Sexual Victim Classification Screening Form, Tenn. Dep't of Corrs.*, https://www.tn.gov/content/dam/tn/correction/documents/50206-1.pdf.
[34] 2009 NPREC Report at 8.
[35] *Sexual Aggressor/Sexual Victim Classification Screening Form*, *supra* note 33.
[36] 2009 NPREC Report at 126 (quotation marks omitted).

the PREA Standards include requirements to provide victims of sexual abuse with access to medical and mental health care. *See Id.* § 115.81-83. "Sexual abuse and emotional and psychological responses may also lead to serious medical conditions."[37] "For both men and women, responses like chronic anxiety, hyper-arousal, sleep disturbances, and eating disorders are strongly associated with development of long-term health problems, including cardiovascular disease, ulcers, and a weakened immune system."[38] The PREA Standards require that facilities provide inmates with access to emergency medical and mental health services (*Id.* § 115.82) related to any report of sexual abuse, a "medical and mental health evaluation, and as appropriate, treatment to all inmates who have been victimized by sexual abuse in prison, jail, lockup, or juvenile facility." *Id.* § 115.82(a). Any inmate who reports at intake that they "experienced prior sexual victimization, whether it occurred in an institutional setting or in the community," will be "offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening." *Id.* § 115.81(a). TDOC has adopted this standard.[39]

[37] *Id.* at 128
[38] *Id.*
[39] *See Policies & Procedures: Medical, Mental Health, Victim Advocacy, and Community Support for PREA Victims*, Tenn. Dep't of Corrs. § 502.06.3, https://www.tn.gov/content/dam/tn/correction/documents/502-06-3.pdf.

PREA does not limit access to medical or mental health care to reports of sexual assault that are investigated and found "substantiated." *See, e.g.*, *Id.* § 115.83(a). The NPREC recognized that a report of sexual assault deemed "unsubstantiated" may involve a sexual assault that did occur and is distinct from a report concluded as "unfounded." "An 'unsubstantiated' finding may be the result of a poor-quality investigation or reflect the legitimate difficulty of gathering sufficient evidence."[40] TDOC has adopted this standard and requires that "[a]ll inmates alleging to be victims of a sexual abuse shall automatically be referred to Mental Health staff utilizing the referral process in accordance with [TDOC Policy]."[41] Thus, even if Lucas' reports of sexual assault had been deemed unsubstantiated, he was nevertheless entitled to the medical and mental health care required under PREA Standards.

Access to mental health care is particularly important for incarcerated LGBT people. A recent study found that incarcerated LGBT people experience "a high prevalence of psychological distress" compared to their heterosexual counterparts.[42] The study attributed this to "a variety of causes that need to be assessed," including higher rates of distress that sexual minorities may experience

[40] 2009 NPREC Report at 118.
[41] *Policies & Procedures*, *supra* note 29, at § 502.06.3.
[42] Meyer, *supra* note 13, at 239.

prior to incarceration due to homophobia and events during childhood.[43] Additionally, distress may be caused by the harsher conditions that LGBT people face in jails and prisons, "including disproportionate sexual victimization, administrative or punitive segregation,[44] and longer sentences."[45]

III. LUCAS' *PRO SE* COMPLAINT STATED COGNIZABLE CLAIMS ALLEGING EIGHTH AMENDMENT AND EQUAL PROTECTION VIOLATIONS[46]

Chase Edward Lucas ("Lucas"), a bisexual man in TDOC's custody, has reported two rapes while incarcerated. *Lucas v. Chalk*, 1:18-cv-01211-JDT, 2018 WL 5622290 (W.D. Tennessee. Oct. 30, 2018). He sought counseling for anxiety caused by the rapes. *Id.* at *1. Allen Chalk ("Chalk"), the prison's Mental Health Coordinator, allegedly said that he believed Lucas was lying because his case had been dismissed as unsubstantiated due to lack of evidence. Chalk also allegedly said that because Lucas was bisexual, he "probably liked it." *Id.* Lucas filed suit alleging violations of the Eighth Amendment, 42 U.S.C. § 1983, and PREA. *Id.* at *2-3.

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[43] *Id.*

[44] Incarcerated LGBT people are punished for "consensual same-sex sexual behavior, [and] some facilities isolate sexual minority individuals, purportedly for their own protection, in administrative segregation. We found that sexual minority inmates . . . were significantly more likely to have experienced administrative or punitive segregation than were straight inmates. The deprivation inherent in many forms of segregation is severe. In turn, segregation is also related to adverse health and mental health outcomes." Meyer, *supra* note 13, at 239.

[45] *Id.*

[46] The facts alleged in Lucas' complaint may give rise to additional causes of action which we do not consider here because they were not raised below and are not before this court.

Pro se plaintiffs are "held to a less stringent pleading standard than a party with an attorney." *Grinter v. Knight*, 532 F.3d 567, 577 (6th Cir. 2008); *see Haines v. Kerner*, 404 U.S. 519, 520 (1972). Courts give "indulgent treatment" to *pro se* litigants' "inartfully pleaded allegations." *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010).

A. Plaintiff's Pleading Denial of Medical Care States A Claim Of An Eighth Amendment Violation

The "less stringent pleading standard" applies to Lucas' *pro se* claim of an Eighth Amendment violation. The Eighth Amendment's proscription on "cruel and inhuman punishments" places a duty on prison officials "to provide humane conditions of confinement," *Farmer v. Brennan*, 511 U.S. 825, 825 (1994). "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . . whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle v. Gamble*, 429 U.S. 97 (1976) at 104-05 (internal quotation and citation omitted).

The complaint states a cognizable Eighth Amendment because it alleges he was denied medical care. *See Estelle*, 429 U.S. at 106. Failure to provide medical care could support a cognizable Eighth Amendment claim. States have an

"obligation to provide medical care for those whom it is punishing by incarceration." *Id.* at 103. Mental health care for victims of sexual assault is critical; untreated trauma caused by sexual assault can lead to Post-Traumatic Stress Disorder, self-mutilating behavior, abuse of drugs and alcohol, and attempts at suicide,[47] and the emotional and psychological responses to sexual abuse can lead to "serious medical conditions" and "long-term health problems…."[48] The regulations implementing PREA, which TDOC has adopted, set out the minimal standard for mental health care that facilities must provide to victims of sexual assault, and to which Lucas was entitled. *See* 28 C.F.R. § 115.81-83. Chalk's accusation that Lucas was lying and in any event, "liked it" were more than mere "derogatory comments" as the court below found them. *Lucas* at *3. Under the applicable "less stringent pleading standard," the facts in Lucas' complaint sufficiently state a claim that that Chalk denied Lucas access to medical care, in violation of the Eighth Amendment.[49] *Hill*, 630 F.3d at 471.

Additionally, comments like Chalk's, identifying or labeling a person as a sexual minority, may in some circumstances themselves create a substantial risk of harm and show deliberate indifference. Given that incarcerated LGBT people are

[47] 2009 NPREC Report, *supra* note 26, at 127-128.
[48] *Id.* at 128.
[49] Additionally, where a history of sexual victimization is itself a vulnerability factor for further sexual abuse (28 C.F.R. § 115.41), depriving a victim of sexual assault of access to mental health care may further constitute a failure to protect the individual from additional sexual violence. *See Estelle*, 429 U.S. at 103; 28 C.F.R. § 115.83(c).

at a greater risk of sexual assault, courts have recognized the dangers inherent in disclosing a person's identity, or labeling a person, as bisexual, gay, or lesbian in prison or jail, and the risk of violence to the person the disclosure or label creates. "[I]n the prison context. . . one can think of few acts that could be more likely to lead to physical injury than spreading rumors of homosexuality and informing on one's co-defendants." *Thomas v. D.C.*, 887 F. Supp. 1, 4-5 (D.D.C. 1995) ("plaintiff has alleged that Sergeant Ingram sexually assaulted and harassed him and told other inmates that he was a homosexual.…"); *see also Brown v. Johnson*, 743 F.2d 408, 412 (6th Cir. 1984) ("Because of the undisputed testimony linking inmate homosexuality with prison violence, ... the blanket ban against the holding of group worship services by the Church [which ministered to homosexuals] is reasonably related to the State's interest in maintaining internal security in the prison."); *Doe v. D.C.*, 215 F. Supp. 3d 62, 77 (D.D.C. 2016) ("a jury could infer that Gladden and Ogu knew Doe faced a substantial risk of rape because of her status as a transgender woman" when they placed her "alone in a cell with a male inmate for an extended period of time").

The complaint articulated the elements of an Eighth Amendment claim - a substantial risk of serious harm and deliberate indifference on the part of defendant, when taken in the context of his sexual orientation and the known heightened risk of sexual abuse to sexual minorities.

B. The Facts In Lucas' Complaint Support A Cognizable Violation Of The Equal Protection Clause

The "less stringent pleading standard" applies to Lucas' complaint of discriminatory treatment in violation of the Equal Protection Clause. *Grinter*, 532 F.3d at 577. "The Equal Protection Clause of the Fourteenth Amendment 'protects against invidious discrimination among similarly-situated individuals or implicating fundamental rights.'" *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (quoting and citing *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006)). As this Court has previously held, "the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Davis*, 679 F.3d at 438 (6th Cir. 2012) (quoting and citing *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997)). "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. For Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. Of Shelby, Mich.*, 470 F.3d 286, 299 (6th Cir. 2006)).

The complaint states that when Lucas sought mental health care to address his anxiety following two reported rapes, the mental health coordinator responded by stating that because Lucas was bisexual, he "probably liked it." *Lucas* at *1. Research shows Chalk is not alone in holding this bias, and indicates that those who hold this bias are less likely to believe gay and bisexual prisoners' allegations of sexual assault because "they associate homosexuality with voluntary participation."[50] Indeed, in a reported example, a corrections officer has shared with incarcerated people their view that "rape is not rape if the victim is gay. . . 'You're an admitted homosexual, you can't be raped.'"[51] In another reported incident, an LGBT victim of sexual assault was told by correctional staff that "their gayness disqualifies them from protection against sexual harassment and assault."[52] "Human Rights Watch [has] report[ed] that correctional officers will label an inmate 'homosexual' in order to record the assault as consensual and avoid having to investigate it."[53] "Thus, when abused prisoners seek institutional

[50] 2009 NPREC Report 73 ("Criminal justice research indicates that some officials 'erroneously assume that inmates who are homosexual or presumed to be homosexual are consenting to the sexual act,' which may cause them to ignore those incidents.") (citing Owen, B., McCampbell, S. W., & Wells, J. (2007), *Staff Perspectives: Sexual Violence in Adult Prisons & Jails: Investigating Sexual Assaults in Correctional Facilities*. Washington, D.C.: U.S. Dep't of Justice, Nat'l Institute of Corrs.); Buchanan, Kim Shayo (2010) *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, Yale Law & Policy Review: Vol. 29: Iss. 1, Article 2, 32 ("Prison officials tend to assume that gay, bisexual, or transgender prisoners consent to sex with any and all men."), available at: http://digitalcommons.law.yale.edu/ylpr/vol29/iss1/2.
[51] Buchanan, *supra* note 50, at 34.
[52] *Id.*
[53] *Id.* at 34-35.

protection against sexual threats or abuse, prison officials commonly give a response which boils down to: 'You're gay. You must have liked it.'"[54] In *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004), plaintiff reported that an officer "told him, 'I personally believe you like d***,' and that he had probably consented to the acts." Brief of Plaintiff-Appellee at 31, *Johnson v. Johnson*, No. 03-10455 (5th Cir. Dec. 29, 2003). In another documented example, officers told an incarcerated person that it was "okay for a 'fa****' to be raped" because "you must like it."[55] In yet another example, a gay incarcerated person informed that "when he reported an inmate rape to correctional officers, three of the officers gang-raped him with a nightstick."[56] Reportedly, "during the assault . . . the officers were laughing, saying, 'shut up, fa****, you're enjoying it,' [and] then laughing while they left." *Id.* "In men's prisons, alleged gayness (like alleged unchastity in rape trials outside prison) tends to establish a low status that, in practice, often disqualifies the victim from legal protection."[57] "Like an unchaste woman, the GBT prisoner is either deemed to have consented, or is told that he deserved the abuse whether he consented or not."[58] Chalk's reported statement is consistent with this dehumanizing bias against LGBT people that is widespread in our systems of

[54] *Id.* at 34.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

incarceration. With his remark, Chalk confessed to believing, and acting on, this dangerous myth about sexual minorities that is deeply rooted in historical bias against gay, lesbian, and bisexual people.

"The State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 197 (1989). The District Court did not apply the liberal pleading standard applicable to *pro se* complaints when finding that Lucas "allege[d] only that Chalk made offensive comments about his sexuality; he does not allege that Chalk actually treated him differently compared to other similarly situated inmates." *See Lucas* at *3; *Grinter*, 532 F.3d at 577. The facts in Lucas' complaint allege that Chalk denied Lucas access to the mental health care he sought due to anxiety from two reported rapes, and that Chalk did so motivated by animus towards bisexuals. *See Lucas* at *1; *Davis*, 679 F.3d at 438. Under the standard applicable to *pro se* plaintiffs, the complaint alleged the elements of an Equal Protection claim.

IV. THE PRISON LITIGATION REFORM ACT REQUIRES MEANINGFUL REVIEW OF PLEADINGS ALLEGING VIOLATIONS OF CONSTITUTIONAL RIGHTS

For LGBT people, incarceration is far too often a sentence to endure significant abuse with very limited means of recourse. Within prisons "most of the methods by which we, as a polity, foster government accountability and equality

among citizens are unavailable or at least not currently practiced."[59] "Lawsuits, which bring judicial scrutiny behind bars…, accordingly take on an outsize importance."[60] When an incarcerated person finds no remedy for a rights violation from within the institution, in most cases the courts remain their only option to seek relief. After the passage of the Prison Litigation Reform Act ("PLRA") in 1996, incarcerated people must meet more stringent requirements when filing lawsuits and face higher stakes if they fail to do so.[61] 42 U.S. Code § 1997e.

The percentage of prisoner civil rights cases that are brought *pro se* has increased from 83.3% of cases in 1996 to 94.9% in 2012.[62] With the vast majority of prisoners representing themselves regarding civil rights violations, it is vital that district courts liberally construe *pro se* complaints and hold them to "less stringent standards" than those drafted by attorneys. *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004)). In addition to the fact that prisoners in civil rights cases are more likely to be

[59] Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 139-40 (2008).
[60] *Id.*
[61] *See generally* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 Brook. L. Rev. 429 (2001); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC Irvine L. Rev. 153 (2015) (hereinafter, "Schlanger, *Trends*").
[62] *Id.* at 167.

representing themselves than anyone else in federal court,[63] people who are incarcerated face many other barriers, such as higher rates of illiteracy, mental illness, and developmental disabilities than their non-incarcerated counterparts.[64] For LGBT people who are incarcerated, the prevalence of psychological distress is even higher than their heterosexual and cisgender peers.[65]All of this counsels toward leniency when evaluating *pro se* prisoners' complaints.

Additionally, the PLRA amended the federal statute on proceeding *in forma pauperis* so that incarcerated people can no longer proceed *in forma pauperis* if they have had three or more complaints or appeals dismissed on the grounds that they were "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. §1915(g). For most indigent incarcerated people, the $400 filing fee to institute their civil rights action is out of reach. This three-strikes provision "is more than a nuisance or even a hardship. It is an absolute barrier to a litigant who does not have the money for filing fees—and many do not. This class of absolutely indigent prisoners is composed disproportionately of the most oppressed

[63] Prisoners in habeas or other quasi criminal proceedings are the only close competitor at 88.8% litigated *pro se*. 34.6% of civil rights cases on behalf of non-incarcerated people are litigated *pro se*. Schlanger, *Trends* at 167.
[64] Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 Wash. U. L. Rev. 899, 902 (2017).
[65] Meyer, *supra* at 239.

people in the prison system, those held in administrative and disciplinary segregation units, frequently the locus of the worst abuses and harshest conditions in the prison system."[66] "[F]ees and penalties often continue to accrue during incarceration. For example, a survey of nearly 1,200 LGBTQ prisoners conducted by the organization Black and Pink found that a majority of those surveyed (eighty-three percent) reported having to pay a fee to see a doctor."[67] Research indicates that LGBT people in the general population are more likely to be living in poverty than non-LGBT people.[68] Bisexual men experience higher rates of poverty than either gay men or straight men.[69] Additionally, LGBT people often face family rejection and are more likely than their non-LGBT peers to rely on non-biological family peer support as they age.[70] When a court dismisses for failure to state a claim, a suit that is clearly not frivolous or malicious, such as in Lucas's case, a strike under the PLRA is still accrued against them. This puts incarcerated LGBT people on a path to significant restriction of their ability to access the only avenue they have for addressing violations of their civil rights – the courts.

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[66] Boston, *supra* note 61, at 432.
[67] Hunter, *supra* note 2, at 95.
[68] *See* Hunter, *supra* note 2.
[69] Shabab Ahmed Mirza, *Disaggregating the Data for Bisexual People*, Ctr for Am. Progress, https://www.americanprogress.org/issues/lgbt/reports/2018/09/24/458472/disaggregating-data-bisexual-people/ (last visited Jan. 18, 2019).
[70] Hunter, *supra* note 2, at 5.

In 2013, this Court held, consistent with *Jones v. Bock*, 549 U.S. 199 (2007) that district courts can allow plaintiffs to amend their complaints, even if they are subject to dismissal under the screening requirements of the PLRA. *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013). Plaintiffs may need to amend a complaint to include additional claims or defendants after having learned new information, to correct a defect in the complaint, or to bolster claims to meet pleading sufficiency requirements.[71] As intended by Rule 15 of the Federal Rules of Civil Procedure, the opportunity to amend a complaint "provides a litigant with the 'maximum opportunity for each claim to be decided on its merits.'"[72] District courts should provide opportunity to amend complaints when the allegations are not "patently meritless and beyond all hope of redemption." *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 37 (1st Cir. 2001).

In sum, at the pleading stage courts should look closely at complaints that allege official actions denying medical care or unequal treatment because of sexual orientation within that context. While limiting frivolous litigation is an important goal, courts should ensure that *pro se* indigent, incarcerated people have the

[71] Dane Westermeyer, *Amended Complaints Post-Twiqbal: Why Litigants Should Still Get a Second Bite of the Apple*, 89 Wash. L. Rev. 1467, 1478 (2014).
[72] *Id.* (quoting 6 Charles Alan Wright et al., Federal Practice and Procedure § 1476 (3d ed. 1998).

opportunity to amend their complaints when they have plead Constitutional violations.

CONCLUSION

Amici respectfully request the Court to hold that Lucas' complaint sufficiently states a claim and reverse the Final Judgment of the District Court, remove the "PLRA" strike against Lucas, direct the District Court to allow Lucas to amend his complaint, and remand the case for further proceedings.

Dated this 22nd day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

1. This petition complies with the length limitation, as provided in Fed. R. App. P. 29(a)(5), because, exclusive of the exempted portions of the brief, the brief contains 6,293 words.
2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.
3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated this 22nd day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this brief was filed and served on January 22, 2019 on all counsel of record electronically via CM/ECF. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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